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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1695

EDWARD R. DAVIES,

Petitioner,

v.

THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS and the SECRETARY OF THE ARMY OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

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EDWARD R. DAVIES,

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THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS and the SECRETARY OF THE ARMY OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on January 15, 1973.

Opinions Below

The Memorandum and Order of the United States Court of Appeals for the First Circuit, dated January 15, 1973, is as yet unreported and is set forth in the appendix, *infra,* p. 23. The Order of the United States District Court for the District of New Hampshire, dated September 19, 1972, is also unreported and is set forth in the appendix, *infra,* p. 25.

Jurisdiction

The judgment sought to be reviewed was filed on January 15, 1973. The time for filing this petition for certiorari was extended to and including June 14, 1973 by order of Mr. Justice Brennan. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the federal district court have jurisdiction over this action to have petitioner's court-martial conviction declared void and vacated in his service records on the ground of serious deprivation of petitioner's constitutional rights in the court-martial proceedings where petitioner is no longer in custody and where, pursuant to an order of the Army Board of Correction of Military Records, the bad conduct discharge which petitioner received as part of his court-martial sentence has been changed to honorable?

2. Is this action barred by the doctrine of *res judicata* where a prior action for declaratory judgment brought by plaintiff was dismissed for lack of jurisdiction and where a prior action for mandamus brought by petitioner *pro se* was dismissed for failure to state a claim of deprivation of rights of a constitutional dimension?

Constitutional and Statutory Provisions Involved

This case involves Article III and the Fourth, Fifth, Sixth, and Eighth Amendments of the Constitution, and 10 U.S.C. §§876 and 1552. Title 10 U.S.C. §§876 and 1552 are set out in the appendix, *infra,* pp. 30-32.

Statement of the Case

Petitioner was tried by general court-martial at Valley Forge Hospital, Phoenixville, Pennsylvania, on May 7-8, 1952, on one specification of arson of an Army Post Chapel in violation of Article 126, Uniform Code of Military Justice (10 U.S.C. §926). He was found guilty and sentenced to a bad conduct discharge, forfeiture of all pay and allowances, and confinement at hard labor for three years. The findings and sentence, after approval by the convening authority, were affirmed by the Army Board of Review. The United States Court of Military Appeals denied petitioner's petition for grant of review.

Petitioner served his sentence in military and, after discharge on February 26, 1953, civilian prisons, being released from custody in 1954. On October 30, 1959, the Army Board for Correction of Military Records denied his application to have his bad conduct discharge changed to honorable. However, on January 19, 1961, the Board reconsidered his application and directed that his bad conduct discharge be changed to honorable as of the date of his discharge. The Board's action was apparently based on insufficiency of evidence pertaining to arson and petitioner's guilt in the record of the court-martial trial. Thereafter, petitioner's requests to the Board that the portion of his sentence pertaining to forfeiture of pay and allowances be removed and that his court-martial conviction be declared void and vacated in his service records were refused. In 1962, petitioner sought a writ of error *coram nobis* from the United States Court of Military Appeals to have his court-martial conviction voided. The writ was denied.

In 1967, petitioner filed the first of his unsuccessful actions in the United States District Court for the District of New Hampshire to void his court-martial conviction. The district court, in *Davies* v. *McNamara,* 275 F. Supp. 278 (D.N.H. 1967), dismissed for lack of jurisdiction petitioner's action against the Secretary of Defense for a declaratory judgment that his court-martial conviction is null and void. The First Circuit affirmed in *Davies* v. *Clifford,* 393 F.2d 496 (1968), holding that since petitioner's bad conduct discharge had been changed to honorable, there was no further administrative relief available and that the action was an attempt to obtain direct review of a court-martial conviction in a federal district court. In 1971, petitioner acting *pro se,* filed his second action in the United States District Court for the District of New Hampshire, seeking a writ of mandamus against the Secretary of the Army to have his court-martial conviction voided and vacated in his service records. The district court's dismissal was affirmed by the First Circuit in *Davies* v. *Resor,* 445 F.2d 1331 (1971), on the ground that petitioner's complaint failed to allege deprivations of rights of a constitutional dimension for which federal court review is permissible.

On June 22, 1972, petitioner, acting *pro se,* sought a writ of error *coram nobis* from the United States Court of Military Appeals alleging thirteen violations of his statutory and constitutional rights before, during, and after the court-martial proceedings, which allegations had not been previously raised in his military appeals or in his actions before the military and federal courts. These allegations, which are summarized in the district court opinion in the instant case, appendix, *infra,* included such serious dep-

rivations of constitutional rights as brutality and inhumane treatment by a C.I.D. agent in an attempt to coerce a confession from petitioner, denial of adequate time for defense counsel to prepare for the trial, insertion of a false confession above petitioner's signature which was obtained through subterfuge, and gross inadequacy of appointed military defense counsel. The allegations also included newly discovered evidence concerning statements made by the C.I.D. agent pursuant to a Pentagon investigation of the case in 1959 which were exculpatory of petitioner, and a notarized statement of an individual that plans to obtain civilian counsel for petitioner for the court-martial were dropped after the post Provost Marshal incorrectly informed petitioner that he could not employ civilian counsel. The Court of Military Appeals dismissed the petition. Misc. Docket No. 72-24.

Petitioner then filed this, his third action, before the United States District Court for the District of New Hampshire. This action, filed *pro se*, against the judges of the United States Court of Military Appeals and the Secretary of the Army, seeks a declaratory judgment that his court-martial conviction is void and a writ of error coram nobis that his court-martial conviction be voided. The action alleged the same thirteen violations of constitutional rights raised in the 1972 action before the Court of Military Appeals. The district court dismissed the action for failure to state a claim upon which relief can be granted. It found that if certain of the allegations were true, "the petitioner was, in fact, deprived of constitutional rights in the proceedings leading to his conviction." However, it found that because "petitioner is no longer confined in an Army prison and his records have been corrected so as to reflect a discharge under honor-

able conditions," there is no further relief available to him, and that "it seems evident that what petitioner really seeks through a finding by this court that the court martial conviction was null and void is money damages for wrongful conviction, false imprisonment, and defamation," which relief is not available because a federal court lacks the authority to order the Secretary of the Army to make such payments. The decision was affirmed by the First Circuit in a two paragraph order based on different grounds—that this action is barred by *res judicata* due to its previous decision in *Davies* v. *Clifford,* 393 F.2d 496 (1968).

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to review the holding of the United States Court of Appeals for the First Circuit in *Davies* v. *Clifford,* held to be determinative in the instant case, that a conviction pursuant to court-martial proceedings alleged to have involved deprivations of petitioner's constitutional rights is not subject to review in federal courts by way of declaratory judgment or other form of civil action where the petitioner has received an honorable discharge and is no longer in custody.

A. *There is a conflict among the circuits and other courts on this issue.*

The United States Court of Appeals for the First Circuit held in petitioner's first action for declaratory relief, *Davies* v. *Clifford,* 393 F.2d 496 (1968) [hereinafter referred to as *Clifford*], that once petitioner's bad con-

duct discharge was changed to honorable there was no further administrative relief available, and that a federal court lacks jurisdiction to entertain further review of his court-martial conviction. This holding is in conflict with decisions in other circuits and courts. *Kauffman* v. *Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970); *Augenblick* v. *United States*, 377 F.2d 586 (Ct. Cl. 1967). Cf. *Smith* v. *McNamara*, 395 F.2d 896 (10th Cir. 1968). The Second Circuit is in accord with *Clifford*. *United States* v. *Carney*, 406 F.2d 1328 (2d Cir. 1969).

The conflict centers on the issue, as yet unresolved by this Court, as to when a federal court has jurisdiction to review a court-martial conviction allegedly obtained in violation of plaintiff's constitutional rights when the plaintiff is not in custody and therefore cannot obtain review through a writ of habeas corpus.

It is settled that federal courts will review deprivations of rights of a constitutional dimension on habeas corpus. *Burns* v. *Wilson*, 346 U.S. 137 (1953); *Augenblick* v. *United States*, 393 U.S. 348 (1969). In *Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965), the argument that habeas corpus is the exclusive remedy for federal court review of a court-martial conviction was rejected. The court held that language indicating finality of court-martial convictions in 10 U.S.C. §876 and of administrative action concerning correction of military records in 10 U.S.C. §1552, did not prevent federal court review of deprivations of constitutional rights in a court-martial by mandamus where the Board for Correction of Military Records and the Secretary had refused to alter a less-than-honorable discharge. The United States Court of Appeals for the District of Columbia has taken the position that federal court review of

a court-martial conviction where the plaintiff is no longer in custody, is not limited to a mandamus action based upon arbitrary failure of the Correction Board to alter a discharge, but may also be obtained through declaratory judgment or other appropriate collateral action challenging a deprivation of constitutional rights to the same extent that a serviceman in custody can obtain review by habeas corpus. *Gallagher* v. *Quinn,* 363 F.2d 301 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 881; *Kauffman* v. *Secretary of the Air Force,* 415 F.2d 991 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 1013 (1970); *Owings* v. *Secretary of the Air Force,* 447 F.2d 1245 (D.C. Cir. 1971); *Homcy* v. *Resor,* 455 F.2d 1345 (D.C. Cir. 1971). Although these decisions involved plaintiffs with less-than-honorable discharges, they contain language indicating that federal court review is appropriate because of the disability arising from the court-martial conviction and sentence and that review is not limited to arbitrary refusal to alter a discharge by the Correction Board. One District of Columbia Circuit opinion has expressly sanctioned non-habeas corpus collateral review where the convicted serviceman did not receive a less-than-honorable discharge. In an unreported decision in *Daniels* v. *Laird,* No. —— (D.C. Cir. 1972), the D.C. Circuit stated that it need not consider whether a petition for writ of habeas corpus by a convicted serviceman (who was subsequently released from custody and received an honorable discharge) was properly dismissed by the district court, because the petition was combined with a complaint for declaratory judgment and mandamus and the plaintiff could obtain the same review of alleged deprivations of constitutional rights in his court-martial by declaratory judgment and mandamus as he could by habeas corpus.

The Court of Claims has taken a similar position, permitting review of constitutional deprivations in an action

for back pay. *Shaw* v. *United States,* 357 F.2d 949 (1966); *Augenblick* v. *United States,* 377 F.2d 586, 592 (1967), *rev'd on other grounds,* 393 U.S. 348 (1969); *Gearinger* v. *United States,* 412 F.2d 862 (1969); *Robb* v. *United States,* 456 F.2d 768 (1972).*

At a time when there are a substantial number of actions seeking federal court review of deprivations of constitutional rights in courts-martial, the circuits are badly divided on the key question of jurisdiction over such cases, and courts, counsel, and parties are left with inconsistent and uncertain rules to guide them in making the critical decision as to the appropriate remedies to seek.

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* In an appeal from the Court of Claims' decision in *Augenblick,* this Court did not reach the question whether collateral attack of a court-martial judgment may be made in the Court of Claims in a back-pay suit alleging a constitutional defect in the court-martial, finding instead that the allegations did not rise to a constitutional level. The Court of Claims thereafter stated that "[t]here is therefore nothing in the Supreme Court's recent decision which compels us to withhold our hand without even considering (or reconsidering) whether the defect in [plaintiff's] court-martial rose to the constitutional level" and reaffirmed its position that it was competent to pass upon a claim that a court-martial was void because of denial of an important constitutional right. *Gearinger* v. *United States,* 412 F.2d 862, at 863-864 (1969). See also *Robb* v. *United States,* 456 F.2d 768 (1972).

B. ***The Davies* v. *Clifford* decision's limitation of non-habeas corpus federal court review of a court-martial conviction to a mandamus action against administrative authorities for arbitrarily failing to alter a less-than-honorable discharge deprived petitioner of review of deprivations of important constitutional rights by a constitutional court. Plaintiff's court-martial conviction constitutes a serious continuing disability just as do custody and a less-than-honorable discharge which entitle a convicted serviceman to review in a constitutional court.***

The holding of the First Circuit in *Clifford* that federal court review of a court-martial conviction in the absence of custody is limited to a mandamus action based on arbitrary failure of administrative authorities to alter a less-than-honorable discharge, creates an unreasonable distinction between convicted servicemen who are still in custody or have a less-than-honorable discharge and those, like petitioner, who are not in custody and have an honorable discharge but who continue to carry the disability of a court-martial conviction on their service records.

Adverse collateral consequences flow from a court-martial conviction for a serious felony like arson which, despite the absence of custody and a less-than-honorable discharge, create serious and continuing disabilities for petitioner. As the Court of Claims stated in *Augenblick,* "[l]iberty is of course important, but so are a man's career, his livelihood, his rights as a veteran, his status as a convicted criminal, and his reputation." 377 F.2d at 592. A felony conviction in a court-martial is considered to be a felony conviction for purposes of loss of civil rights and imposition of civil disabilities. *United States* v. *Lee,* 428 F.2d 917 (6th Cir. 1970). Therefore, petitioner is subject to loss of a variety of civil rights including, in some states, the right to vote, run for or hold office, and sit on juries, see *Carafas* v. *LaVallee,* 391

U.S. 234, 237 (1968); is forbidden from a variety of occupations, such as labor union official, and professions; and cannot perform a variety of acts permissible by citizens, such as transportation of firearms in interstate commerce, 15 U.S.C. §902(e) (1964). *See generally, Special Project, The Collateral Consequences of a Criminal Conviction,* 23 Vand. L. Rev. 929 (1970).

In addition, military service records contain a notation of the court-martial conviction. Although not normally obtainable by potential employers, these records may be referred to when an individual applies for government employment or security clearance which is necessary for certain types of public and private employment. Most employment applications, of course, ask for criminal convictions and petitioner, under the risk of making a false statement, is required to show his court-martial conviction for the felony of arson.

There is no apparent reason why convicted servicemen in custody or with a less-than-honorable discharge should be entitled to federal court review of their claims of denial of important constitutional rights in their courts-martial while petitioner should not be. As has been indicated, the adverse collateral consequences arising from a felony court-martial conviction are no different than from a less-than-honorable discharge or even from certain lesser forms of custody such as release on bail or parole. It is true that there are certain historical and procedural requirements which would limit the availability of the writ of habeas corpus to persons in custody and, at least pursuant to the interpretation of *Clifford* (with which petitioner disagrees), would limit the writ of mandamus or other civil action to persons challenging arbitrary administrative action in refusing to alter a less-than-hon-

orable discharge. However, these procedural limitations are not sufficient reason for treating differently a class of persons who suffer the same type of disability resulting from a conviction and for denying them review in a constitutional court of deprivations of constitutional rights.

C. *The Davies* v. *Clifford decision's limitation of non-habeas corpus federal court review of a court-martial conviction to a mandamus action against administrative authorities for arbitrarily failing to alter a less-than-honorable discharge constitutes a misreading of the First Circuit's opinion in Ashe* v. *McNamara and of the finality provisions of Article 76, UCMJ, and results in inconsistent and unjust determinations in judicial review of deprivations of constitutional rights in courts-martial.*

The reason given by the *Clifford* court for its narrow holding is that federal courts have no jurisdiction to review a court-martial conviction directly. A mandamus action, presumably, is not an attack upon the conviction, but upon arbitrary administrative action and therefore is permissible. The court is clearly using a legal fiction. In mandamus action against the Secretary to alter a punitive discharge, the plaintiff is permitted to raise all deprivations of constitutional rights in his court-martial, and it is surely a semantic sleight of hand to argue that this is not a form of review of the court-martial conviction. The apparent reason for the *Clifford* court's concern that the fiction be maintained is its tortured reading of *Ashe* and Article 76, UCMJ. It maintains (and the argument is elaborated more fully in the district court opinion, *Davies* v. *McNamara*, 275 F. Supp. 278 (D.N.H. 1967)) that the court in *Ashe* was only reviewing the administrative failure to correct the punitive discharge pursuant to 10 U.S.C. §1552, but that if there were no punitive discharge to correct, it would

have had to review the court-martial directly. This, the court argues, is forbidden by Art. 76, UCMJ, 10 U.S.C. §876, which provides that findings and sentences of courts-martial, as reviewed and approved, are "final and conclusive."

The court in *Ashe,* although concerned primarily with the finality provisions of 10 U.S.C. §1552, rejected the argument that Article 76 prevents judicial review of court-martial convictions. Although the government argued Article 76 "finality," the court stated: "[W]e think it was as much the duty of the Secretary and the Correction Board, *as it would have been of a court empowered to entertain a collateral attack upon some final decision,* to treat as void a sentence thus unconstitutionally imposed" (emphasis added). 355 F.2d at 282. Thus the *Ashe* court seems not to have had the same concern as the *Clifford* court that Article 76 forbids judicial review of a court-martial conviction as the italicized words indicate that the *Ashe* court equated collateral attack by means of mandamus against the Secretary with other forms of collateral attack upon court-martial convictions. This view is confirmed by the order of the District Court on remand in *Ashe* "that the conviction imposed upon the plaintiff . . . by a general court martial heard on May 5, 1947 at the Naval Station, Norfolk, Virginia, is void and invalid." Civil Action 64-911-5. This order indicates that the *Ashe* court considered that it was reviewing more than simply the arbitrary administrative refusal to alter a punitive discharge and felt it within its jurisdiction to void the court-martial conviction.

The severe limitation of the *Clifford* court upon the availability of collateral review of deprivations of constitutional rights in courts-martial is likely to result in in-

consistent and unjust determinations. Although 10 U.S
§1552 is vague as to what remedies the Boards of Corr
tion of Military Records can grant, see *Owings* v. *Secreta*
of the Air Force, 298 F. Supp. 849, 852 (D.D.C. 196
it is now generally believed that the Boards are limited
corrective action as to discharge and court-martial s
tence and cannot alter a court-martial conviction,
H. MOYER, JUSTICE AND THE MILITARY 1199 (1972). Thus
Correction Boards can provide only partial relief to
serviceman who claims that his court-martial convicti
was obtained in violation of his constitutional rights. Ho
ever, most ex-servicemen do not know that the Correcti
Boards offer only partial relief, and they, like Davi
often seek relief from the Boards without assistance
counsel. More importantly, ex-servicemen do not kn
that if they apply to the Corrections Board for relief a
like Davies, are successful in having their less-than-hon
able discharge changed to honorable, they thereby wa
the opportunity, under the *Clifford* holding, to federal co
review to void their conviction. Ironically, a servicem
who is unsuccessful in having his punitive discharge
tered by the Corrections Board can, under the *Cliff*
holding, obtain federal court review of his court-mart
conviction in a mandamus action, but a serviceman who
successful in having his punitive discharge altered, lo
all opportunity for court review to void his convicti
Thus, the serviceman who, like Davies, makes out a go
case before the Board showing defects in his court-mart
thereby loses the opportunity for court review to void
conviction, while the serviceman who does not make ou
good case before the Board may then seek federal co
review both to alter his discharge and void his senter
This works the grossest of unfairness and results in a

trary and inconsistent administration of review of court-martial convictions. Clearly the *Clifford* holding, by emphasizing form rather than substance in order to maintain an unnecessary function, provides neither an efficient nor a just procedure for determining when and how judicial review of court-martial convictions is available.

II.

Certiorari should be granted to review the holding of the United States Court of Appeals for the First Circuit that this action is barred by the doctrine of *res judicata* due to its previous decision in *Davies* v. *Clifford*.

The First Circuit affirmed the district court's dismissal of this action, but on different grounds than the district court, holding that its previous decision in *Davies* v. *Clifford* barred this action by reason of *res judicata*. In *Clifford*, the First Circuit affirmed the district court's dismissal of petitioner's action for a declaratory judgment that his court-martial conviction was void, finding that the court lacked jurisdiction. The district court and court of appeals did not reach the merits of the action in *Clifford*, and pursuant to Rule 41(b), Federal Rules of Civil Procedure, the dismissal does not operate as an adjudication upon the merits.

The general rule is that a judgment based on lack of jurisdiction over the subject matter is not *res judicata*, but only operates as an estoppel as to issues actually litigated. Restatement of Judgments, Sec. 49 (1942). After dismissal for lack of jurisdiction over the subject matter, a plaintiff may bring a second suit on the same cause of

action which will not be met by the jurisdictional bar. *Illinois Central Railroad Company* v. *Mississippi Public Service Commission,* 135 F. Supp. 304 (S.D. Miss. 1955); *Kipbea Baking Company* v. *Strauss,* 218 F. Supp. 696 (E.D.N.Y. 1963). It has also been held that the findings of a court in dismissing an action for lack of jurisdiction are not binding on a court in a second suit on the same cause of action in making its determination of jurisdiction. *Williams* v. *Minnesota Mining and Manufacturing,* 14 F.R.D. 1 (S.D. Cal. 1953). Cf. *Tyler Gas Service Company* v. *Federal Power Commission,* 247 F.2d 590 (D.C. Cir. 1957), *cert. denied,* 355 U.S. 895. It has been held that a determination of a lower federal court concerning its own jurisdiction can only be attacked on direct review, but these cases have involved a finding by a court that it had jurisdiction and is justified by the doctrine that once a court acquires jurisdiction, it has the power to decide all issues arising thereunder and that its judgment is not subject to collateral attack, even if erroneous. *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371 (1940). Even regarding these cases in which the lower court found that it had jurisdiction, the bar on collateral attack is not absolute, the rule being that where the policy underlying the doctrine of *res judicata* is outweighed by other important policies, the judgment may be attacked collaterally. See Restatement of Conflict of Laws, Sec. 451(2) (Supp. 1948); Restatement of Judgments, Sec. 10 (1942). Similarly, where subsequent events create new legal situations or alter the legal rights of the parties, *res judicata* and collateral estoppel have been held not to apply. See citations in 49 A.L.R.2d at 1058.

Res judicata and estoppel are not absolutes, but rather are flexible rules to be applied when the policies they are intended to serve—such as prevention of piecemeal litigation, conservation of judicial resources, and bringing an end to litigation—outweigh the demands of justice in permitting a party to litigate. As stated in *Loucke* v. *United States*, 21 F.R.D. 305, 310 (S.D.N.Y. 1957), an action for relief from a prior judgment entered in an action dismissed for lack of jurisdiction:

> But the courts are not powerless; for where the demands of fairness and decency in the individual case are extraordinary and so compelling that it would be grossly inequitable to adhere to the strict doctrine of res judicata, the interest of finality of litigation will be subordinated to that of plain justice.

The demands of *res judicata* and collateral estoppel are even further weakened in habeas corpus cases. This Court stated in *Salinger* v. *Loisel*, 265 U.S. 224, 230 (1924): "At common law the doctrine of *res judicata* did not extend to a decision on habeas corpus refusing to discharge the prisoner . . . and this Court has conformed to it and thereby sanctioned it." See *Sanders* v. *United States*, 373 U.S. 1, 13-14 (1963). Despite a statement in the Senate Report concerning the 1966 amendment to the habeas corpus statute, 28 U.S.C. §2244(a), that a new provision for "finality of determination" was to provide for "a qualified application of the doctrine of res judicata," Senate Report No. 1797, 1966 U.S. Cong. & Ad. News 3663, 3664, it is generally believed that the amendment does not have that effect. Sokol states:

> It is debatable whether *res judicata* could, consistently with Article I, section 9 of the Constitution prohibiting the writ's suspension save "when in Cases of Rebellion or Invasion if the public safety may require it," be statutorily imposed as a limitation upon the writ's availability. While the question is of conceptual interest, as a practical matter the problem is met by the doctrine of successive petitions. The doctrine of res judicata has historically not been used in habeas corpus proceedings; the doctrine is not applicable now, and there is no reason for it to be held applicable within the foreseeable future. SOKOL, FEDERAL HABEAS CORPUS 158-59 (1969).

The "successive-petitions doctrine" is spelled out in *Sanders* v. *United States,* 373 U.S. 1, at 16 (1963), and provides that a successive habeas corpus petition can only be denied if, *inter alia,* "the ends of justice would not be served by reaching the merits of the subsequent application." This Court went on to note that the ends of justice would be defeated under such circumstances as that "the evidentiary hearing on the prior application was not full and fair" or that there was "an intervening change in the law or some other justification for having failed to raise a crucial point or argument in the prior application." 373 U.S. at 16-17. The cases have indicated that each habeas corpus petition is to be disposed of in the exercise of sound judicial discretion and that successive petitions, even where raising similar facts or claims or where petitioner knew of such facts or claims when he filed the earlier petition, should not be denied if not in the interests of justice. *Vanhook* v. *Craven,* 419 F.2d 1295 (9th Cir. 1969); *Goins* v. *Allgood,* 391 F.2d 692 (5th Cir.

1968); *McDonald* v. *Swope*, 79 F. Supp. 30 (1948), *rev'd*, 173 F.2d 852 (9th Cir. 1949); *Swihart* v. *Johnston*, 150 F.2d 721 (9th Cir. 1945), *cert. denied*, 327 U.S. 789 (1946); *Slaughter* v. *Wright*, 135 F.2d 613 (4th Cir. 1943).

The circumstances of the instant case clearly indicate that *res judicata* is not applicable and that the First Circuit erred in affirming the district court's dismissal solely on the basis of *res judicata*. Petitioner's action in this case for declaratory judgment to declare his court-martial conviction void is analogous to a petition for writ of habeas corpus. Like a petition for writ of habeas corpus, it is the means by which petitioner challenges his conviction in a criminal proceeding in which there were deprivations of his constitutional rights. As has already been discussed, the availability of mandamus made possible in *Ashe* and of declaratory judgment and back pay suits made possible in the D.C. Circuit and Court of Claims for collateral attack upon a court-martial conviction, are simply alternate remedies to habeas corpus to permit the same kind of review of deprivations of constitutional rights which are available to convicted servicemen in custody by means of habeas corpus. Rather than expand the habeas corpus "in custody" requirement, as did the court in *Settler* v. *Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969), the court in *Ashe* and other courts established alternate remedies to serve the same function as habeas corpus. Since the action in the instant case is analogous to a habeas corpus action, the rule that *res judicata* is not applicable in habeas corpus actions should apply here.

Even if the rule of nonapplicability of *res judicata* to habeas corpus is not applied in the instant case, the First Circuit still erred in holding that this action is barred by *res judicata*. *Res judicata* should not be applied when the

policies underlying it are outweighed by the interests of justice in hearing the litigation. The policies for applying *res judicata* in the instant case are weak. The government as the opposing party does not need the kind of protection of repose and reliance interests which are often important in civil cases involving private parties or even in cases in which governmental activities are affected. Here there is no conceivable repose or reliance which the government has undertaken since the *Clifford* decision in 1967 which would be disturbed by hearing this case on the merits. The need for an end to litigation is also of minor significance where the government is a party in an action which only seeks to void a court-martial conviction in service records and is clearly outweighed by the interests of justice in insuring vindication of constitutional rights. No great drain on judicial and legal resources would result from hearing this case on the merits. Petitioner's complaint in *Davies* v. *Clifford, Davies* v. *Resor,* and the instant case were all summarily dismissed on the pleadings in pre-trial motions with no evidentiary hearings and no judicial consideration of the merits. A hearing on the merits now would be the first and would not be repetitious of what has gone before.

Finally, the government in its brief before the First Circuit argued that the present action is barred by *res judicata* because of the decision of the First Circuit in *Davies* v. *Resor,* 445 F.2d 1331 (1st Cir. 1971), affirming the district court's dismissal on the grounds that the complaint failed to allege deprivations of rights of a constitutional dimension. However, the First Circuit did not base its opinion as to *res judicata* on this ground. Suffice it to say that the argument that *Davies* v. *Resor* consti-

tutes a bar to this action under *res judicata* is without substance. The district court there dismissed the complaint in a pre-trial motion based upon the sufficiency of the pleadings alone. Such a dismissal, in the nature of the sustaining of a demurrer, is not an adjudication on the merits and only constitutes an estoppel as to the same facts in a subsequent action. Restatement of Judgments, Sec. 50 (1942). "A new action on a complaint in which the defect has been corrected is not barred, and it does not matter that the plaintiff failed in the first action to avail himself of permission to amend." *Id.* at Sec. 50(2). The allegations in the present complaint of thirteen deprivations of statutory and constitutional rights were not contained in the complaint in *Davies* v. *Resor* and therefore the judgment there does not bar this complaint based upon different allegations stating a good cause of action. Furthermore, petitioner filed his complaint in *Davies* v. *Resor pro se* which accounts for the inartful manner in which the complaint was drawn and the failure to allege deprivations of constitutional rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1973

APPENDIX

Memorandum and Order

Entered: January 15, 1973

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 72-1327.

EDWARD R. DAVIES,

Plaintiff-Appellant,

v.

THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS *et al.*,

Defendants-Appellees.

Before:

ALDRICH, McENTEE and CAMPBELL,

Circuit Judges.

Appellant concedes, as he must, that in the light of our previous decision in *Davies* v. *Clifford,* 1 Cir., 1968, 393 F.2d 496, he is squarely faced with the obstacle of res judicata. He says we invited reconsideration of *Clifford* because in rebuffing a second undertaking on his part, in *Davies* v. *Resor,* 1 Cir., 1971, 445 F.2d 1331, we cited the case of *Kauffman* v. *United States,* D.C. Cir., 1969, 415 F.2d 991, *cert. denied* 396 U.S. 1013. It would be highly singular that in the very act of denying appellant relief we were recognizing that we were mistaken in doing so.

But quite apart from such a paradoxical suggestion, we cited *Kauffman* in connection with the proposition that in *Resor* appellant had not even met the condition precedent of showing constitutional error. The fact that there was a dictum in *Kauffman* in appellant's favor on another point is not significant. The citation of an opinion for one point does not mean approval of everything else to be found therein.

We have, on one occasion, reversed a decision of long standing against a party, and granted that party relief when it appeared that in the interval a statute upon which we had relied had been held to be unconstitutional. Here we have no such inducement. We do not believe we were mistaken before, but even if we were, that is not enough.

The judgment of the district court is affirmed.

By the Court:

(Illegible)
Clerk.

Order

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 72-197

EDWARD R. DAVIES

v.

THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS and the SECRETARY OF THE ARMY OF THE UNITED STATES

The motion to proceed in forma pauperis is granted.

This is the third petition brought by Edward Davies in this court: See *Davies* v. *McNamara,* 275 F.Supp. 278 (D. N.H. 1967); *Davies* v. *Clifford,* 393 F.2d 496 (1st Cir. 1968); *Davies* v. *Resor,* 445 F.2d 1331 (1st Cir. 1971). In addition, the petitioner also brought a "Writ of Error, Coram Nobis" to the United States Military Court of Appeals which was denied on June 29, 1972. This petition, like its predecessors, seeks to have the plaintiff's Army court martial conviction of May 8, 1952, declared null and void. According to the petitioner, his court martial conviction was upheld by the United States Court of Military Appeals in 1952, 1962, and on June 29, 1972. In its opinion in *Davies* v. *Resor, supra,* the First Circuit Court of Appeals noted at page 1332:

> In the present case we see no allegation or evidence that appellant was deprived of constitutional rights

in the proceedings leading to his conviction. Without such constitutional violation the granting of further relief remains within administrative discretion.

In the instant petition, the petitioner alleges thirteen violations of his constitutional rights to a fair trial and due process of law. These are summarized as follows:

One—Brutality and inhumane treatment by C.I.D. Agent Thomas R. Taylor in an attempt to coerce a false confession.

Two—Article 31 of the Uniform Code of Military Justice was not read to the petitioner as required by military law.

Three—Petitioner was denied the right to retain a civilian defense lawyer of his own choice.

Four—The defense counsel assigned to the petitioner was not given the necessary time to prepare for the trial and, therefore, the petitioner was denied his right to a fair trial.

Five—The law officer at the court martial improperly allowed in evidence an oral confession.

Six—The oral confession allowed in evidence was never in fact made and petitioner alleges that it was manufactured by C.I.D. Agents Taylor and Jalinski.

Seven—The evidence was insufficient in fact and in law to prove arson.

Eight—The petitioner's signature on an alleged statement used as evidence at the trial was obtained by subterfuge.

Nine—C.I.D. Agent Taylor informed the Assistant General Counsel, Office of the Secretary of the Army, who was investigating petitioner's case pursuant to 10 U.S.C. §1552, that no incendiary material of any kind had been found during the investigation of the cause of the fire.

Ten—Petitioner's lawyer wrongfully advised him at the court martial not to take the witness stand.

Eleven—Petitioner was denied his right to legal assistance to prepare a petition for review to the United States Court of Military Appeals.

Twelve—The prison authorities at Fort Leavenworth, Kansas punished him for bringing a petition for writ of habeas corpus and destroyed the petition which was addressed to the Federal District Court of Kansas.

Thirteen—The same allegations are made as to another petition for writ of habeas corpus addressed to the United States District Court in Columbus, Ohio.

It seems clear that if allegations one, four, and eight are true, the petitioner was, in fact, deprived of constitutional rights in the proceedings leading to his conviction. Even assuming that such allegations are true, I rule that the petitioner is not entitled to any relief from this court. On January 19, 1961, the Army Board for Correction of Military Records, pursuant to 10 U.S.C. §1552, changed the petitioner's bad conduct discharge to an honorable one. It seems evident that what petitioner really seeks through a finding by this court that the court martial conviction was null and void is money damages for wrongful conviction, false imprisonment, and defamation. See prior opinion of this court in Civil 3308, *Davies* v. *Resor,* issued March 29, 1971, and pleadings filed by petitioner in that case.

In *Ash* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965), on which the petitioner relies, the First Circuit Court of Appeals through Judge Hastie held that the court had the power under 10 U.S.C.A. § 1552 where there was a clear cut violation of constitutional rights to order the appropriate military department to reconsider the plaintiff's petition for correction of sentence and, under 10 U.S.C.A. § 1552, change a dishonorable discharge to an honorable discharge. In the instant case, the Secretary of the Army has already changed the petitioner's discharge from a dishonorable one to an honorable one. It is my opinion that I do not have the authority to order the Secretary of the Army to pay damages or even to award the petitioner back pay pursuant to 10 U.S.C.A. § 1552(c). If this were a traditional habeas corpus proceeding and if it were found that the petitioner had been convicted as a result of violations of his constitutional rights, the most that I could do would be to issue the writ of habeas corpus and order the prisoner's release. The petitioner is no longer confined in an Army prison and his records have been corrected so as to reflect a discharge under honorable conditions. It is to be further pointed out that at the time the prisoner's discharge was changed from dishonorable to honorable, he received severance pay in the amount of $234.44. 10 U.S.C.A. § 1552 (c) provides in part:

> A claimant's acceptance of a settlement under this section fully satisfies the claim concerned.

The petition is dismissed because it does not state a claim upon which relief can be granted.

The Clerk of Court shall send a copy of the pleadings and this order to the United States Attorney for the District of New Hampshire which shall constitute service in this case.

So Ordered.

Hugh H. Bownes
United States District Judge

September 19, 1972

cc: Edward R. Davies
William B. Cullimore, Esq.

General Military Law

Title 10 U.S.C. § 876. Art. 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President. Aug. 10, 1956, c. 1041, 70A Stat. 64.

Title 10 U.S.C. § 1552. Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured

by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1695

EDWARD R. DAVIES, PETITIONER

v.

THE JUDGES OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE SECRETARY OF THE ARMY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The court below held that its 1968 decision in *Davies* v. *Clifford,* 393 F. 2d 496, is a bar to the present action. Petitioner in effect seeks review of the merits of that earlier decision. The only question properly presented here, however, is whether the court below correctly applied the doctrine of *res judicata.*

In 1952, petitioner, then a private in the United States Army, was tried by general court-martial, convicted of arson, and sentenced to be discharged with a bad conduct discharge, to forfeit all back pay and allowances, and to be confined at hard labor for three years. After the findings and sentence were affirmed by a Board of Review and by the United States Court of Military Appeals, petitioner's sentence was ordered into

execution. He was released from custody in 1954. In 1961, following a hearing before the Board for the Correction of Military Records, an Assistant Secretary of the Army, after reviewing the trial record, directed that petitioner's records be changed to show that he received an honorable discharge.

In 1962 the Court of Military Appeals denied a petition for a writ of error *coram nobis,* by which petitioner sought to have his court-martial conviction vacated. Four years later, petitioner, represented by counsel, brought an action in the district court against the Secretary of Defense seeking a declaratory judgment that this court-martial conviction and sentence were invalid. He alleged errors in his trial that violated his constitutional rights. The district court dismissed the complaint for lack of jurisdiction, *Davies* v. *McNamara,* 275 F. Supp. 278 (D. N.H.), and the court of appeals affirmed, *Davies* v. *Clifford,* 393 F. 2d 496 (C.A. 1). The court of appeals held that, since petitioner was in effect seeking "direct review of the conviction" and had already been granted "the administrative relief of voiding his 'punitive sentence'" (393 F. 2d at 497), the court was without jurisdiction. Petitioner did not seek certiorari.

In 1969, petitioner, *pro se,* brought a mandamus action in the district court to compel the Secretary of the Army to issue him a certificate of innocence, to remit all back pay and allowances due, to reinstate him at a higher enlisted rank, to remove all lost time from his records, and to compensate him for his alleged wrongful conviction. The district court denied the petition for mandamus and the court of appeals affirmed, finding "no allegation or evidence" that petitioner "was deprived of constitutional rights in the proceedings leading to his conviction." *Davies* v. *Resor,* 445 F. 2d 1331, 1332 (C.A. 1). Petitioner did not seek certiorari.

In 1972, petitioner again sought a writ of error *coram nobis* from the Court of Military Appeals. Following denial of that petition, he brought the instant action in the district court against the Judges of the Court of Military Appeals and the Secretary of the Army, alleging violations of his constitutional rights and seeking a declaratory judgment that his court-martial conviction is "null and void." The district court dismissed the complaint for failure to state a claim upon which relief could be granted (Pet. App. 25-29). The court of appeals affirmed on a different ground, holding that the action was barred by *res judicata* in view of its previous decision in *Davies* v. *Clifford, supra* (Pet. App. 23-24).

The decision of the court of appeals was correct, and further review is not warranted.

1. Petitioner's present action, like that in *Davies* v. *Clifford,* is predicated upon the claim that the civil courts have jurisdiction to review and declare "null and void" his conviction by a military court-martial 20 years ago, even though he is no longer in custody and has been given an honorable discharge. The court of appeals held in *Clifford* that it had "no jurisdiction to review the Court of Military Appeals" except by a writ of habeas corpus, and that petitioner had already received the "administrative relief of voiding his 'punitive sentence'" (393 F. 2d at 497, and n. 2).

> Whether our present disclaimer be phrased in terms of absence of any present controversy to support a declaratory judgment where petitioner is under no current disability or restraint, or absence of direct jurisdiction over the conviction itself, the district court's dismissal of the petition was correct. [*Id.* at 497.]

In these circumstances, the court below properly concluded that, under the principles of *res judicata*, the earlier decision constituted a bar to the maintenance of petitioner's present action (Pet. App. 23-24).

Petitioner argues that the dismissal in the prior case, since it rested on a question of the court's jurisdiction, "does not operate as an adjudication upon the merits" (Pet. 15). It is settled, however, and petitioner's counsel conceded below (see Pet. App. 23), that "[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues" (*American Surety Co.* v. *Baldwin*, 287 U.S. 156, 166 (Brandeis, J.)). See also *Hadge* v. *Second Federal Savings and Loan Association of Boston*, 409 F. 2d 1254, 1257 (C.A. 1) ("the principle of *res judicata* applies to a finding of lack of subject matter jurisdiction. * * * A party is entitled to one day in court, but only one"); *Barzin* v. *Selective Service Local Board No. 14*, 446 F. 2d 1382 (C.A. 3) (*res judicata* bars second suit seeking preinduction review of classification where first suit was dismissed for lack of jurisdiction); *Estevez* v. *Nabers*, 219 F. 2d 321 (C.A. 5) (*res judicata* bars second suit where first suit was dismissed for failure to allege a controversy of a justiciable nature); *Acree* v. *Air Line Pilots Assn.*, 390 F. 2d 199 (C.A. 5), certiorari denied, 393 U.S. 852. The court ruled in *Clifford* that it had no jurisdiction over a claim indistinguishable from that presented by petitioner in the instant action. The jurisdictional ruling in *Clifford* was therefore determinative here, and the court properly held that the case must be dismissed regardless of the correctness of the *Clifford* decision (Pet. App. 24).[1]

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[1] Petitioner argues that the doctrine of *res judicata* is flexible and should not be applied where the policies it serves are

2. Because the court of appeals decided this case solely on the ground that the action was barred by the principles of *res judicata*, it did not consider petitioner's claim that the civil courts can review a court-martial conviction where the serviceman is no longer in custody and has been given an honorable discharge from the armed forces. Indeed, petitioner expressly seeks review in this Court, not of the decision below, but of the 1968 decision in *Davies* v. *Clifford* (Pet. 6-15). We submit that the petition does not properly present the issue.

It is not enough to say, as petitioner does (Pet. 6), that the earlier decision was "held to be determinative in the instant case * * *." The court did not adjudicate the merits of petitioner's claim; rather, it refused to do so on the basis of *res judicata*. Petitioner cannot revivify a five-year old final decision by raising an identical claim and, after dismissal on *res judicata* grounds, seeking review in this Court on the underlying issue presented in the earlier case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

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outweighed by "the demands of justice in permitting a party to litigate" (Pet. 17). The court of appeals, however, did not reject that argument; it merely held that the circumstances here did not require a suspension of the principles of *res judicata*. Thus, it indicated that it might permit further litigation if, for example, "a statute upon which we had relied had been held to be unconstitutional" after the earlier decision had been rendered (Pet. App. 24). Here, however, there was no such intervening development. The court properly held that it is insufficient merely to question the correctness of the earlier decision. "We do not believe we were mistaken before, but even if we were, that is not enough" (*ibid.*).